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Taking the Paris Agreement forward

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Chapter 5

Taking the Paris Agreement Forward: Continuous Strategic Decision-making on Climate Action by the Meeting of the Parties

Petra Minnerop

Abstract

There is a new cloth on the table that provides the setting for global climate action. The 2015 Paris Climate Agreement represents the future legal framework designed to facilitate global efforts to combat climate change in the long-term. This article looks at the fabric of this framework through the lens of the law-making procedure. The law-making procedure that brought the Paris Agreement into life and will sustain it, marks a departure from the traditional framework convention-cum-protocol approach and changes it into a 'framework convention-cum-decisions' model. While the Kyoto Protocol was prescriptive in setting individual emission targets for developed countries, the Paris Agreement sets forth an evolutionary multilateral treaty and enables Parties to steer collective and individual efforts towards a worldwide temperature goal through continuous, strategic decision-making. The article demonstrates that the Agreement becomes operational only in the context of the decisions that were adopted by the Conference of Parties with the Agreement and in the context of further decisions that need to be adopted by the 'Conference of Parties serving as the meeting of the Parties to the Paris Agreement'. Many of the skeletal provisions and mechanisms of the Paris Agreement need to be fleshed out and operated through further decisions. New functions and competences conferred on the 'Conference of Parties serving as the Meeting of the Parties' change the role that this meeting of the Parties has, making it the driver for the development of the law on combating climate change. This international law-making is reinforced through the integration of Parties' decisions within legal orders of Parties, the European Union legal order will be used as an example of one legal order acting as a transmission belt. The article contends that this strategic decision-making affects the legal certainty of international climate action and contravenes the balance between legislative approval of an international agreement and the prerogative of national governments for strategic decisions.

Keywords

United Nations Framework Convention on Climate Change – Paris Climate Agreement – Kyoto Protocol – Nationally Determined Contributions – Global Stocktake – Adaptation – Mitigation – Compensation – Conference of Parties

i Introduction

The world's future climate depends on whether the Paris Agreement, the new cloth on the negotiating table between Parties, maintains the power to gather Parties together in the future and to connect Parties more than it separates them.¹ With its 195 signatories and 178 Parties, the Paris Agreement (in the following also 'the Agreement') is truly universal.² Following the decision of the United States to withdraw from the Paris Agreement which is not the formal notification of withdrawal as required by the Paris Agreement,³ the European Council confirmed that from the European perspective, the Agreement remains a cornerstone of global efforts to effectively tackle climate change and excluded renegotiating the Agreement.⁴ This view was also declared by leaders at the 2017 G20 Summit.⁵

1 For the working principles of the Public Realm, see H. Arendt, *The Human Condition* (2nd ed University of Chicago Press 1998) 53.

2 Paris Agreement 2015 (done 22 April 2016, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1. As of 13 June 2018, 178 Parties have ratified the Agreement, of 197 Parties to the United Framework Convention on Climate Change (unfccc) (signed 4 June 1992, entered into force 21 March 1994) 1771 UNTS 107.

3 See { [HYPERLINK "http://newsroom.unfccc.int/unfccc-newsroom/unfccc-statement-on-the-us-decision-to-withdraw-from-paris-agreement"](http://newsroom.unfccc.int/unfccc-newsroom/unfccc-statement-on-the-us-decision-to-withdraw-from-paris-agreement) \h } { [HYPERLINK "http://newsroom.unfccc.int/unfccc-newsroom/unfccc-statement-on-the-us-decision-to-withdraw-from-paris-agreement"](http://newsroom.unfccc.int/unfccc-newsroom/unfccc-statement-on-the-us-decision-to-withdraw-from-paris-agreement) \h } (last visited 28 September 2017). Art. 28 of the Agreement stipulates that a Party may withdraw from the Agreement any time after three years from the date on which the Agreement has entered into force for that Party. The withdrawal shall then take effect upon expiry of one year from the date of receipt by the depositary of the notification of withdrawal.

4 European Council Conclusions on the Paris Agreement on Climate Change, 22 June 2017, available at { [HYPERLINK "http://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-paris-agreement"](http://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-paris-agreement) \h } { [HYPERLINK "http://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-paris-agreement"](http://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-paris-agreement) \h } (last visited 7 June 2018).

5 Annex to G20 Leaders Declaration, G20 Hamburg Climate and Energy Action Plan for Growth, at 1, contains the reference that 'The United States is currently in the process of reviewing many of its policies related to climate change and continues to reserve its position on this document and its contents, available at { [HYPERLINK](#)

"https://www.g20germany.de/Content/DE/_Anlagen/G7_G20/2017-
g20-climate-and-energy-en.pdf?__blob=publicationFile&v=6" \h
} { HYPERLINK
"https://www.g20germany.de/Content/DE/_Anlagen/G7_G20/2017-
g20-climate-and-energy-en.pdf?__blob=publicationFile&v=6" \h
} (last visited 7 June 2018). © Please check the unpaired quotation mark in the sentence "I, contains the reference...".

The literature on the Agreement is already rich, providing analysis of the legal status and architecture of its provisions, the context of the negotiating history, and the potential of the Agreement to reduce anthropogenic greenhouse gas (ghg) emissions.⁶ As such, the objective of this article is to scrutinize the fabric of the new cloth and to focus on the innovative method of international law-making that both the Paris Agreement and the Paris Decision, with which the Paris Agreement was adopted by the Conference of Parties in Paris, represent. Technically, the Paris Agreement is included as Annex to the Paris Decision.⁷ Yet as Laurence Boisson de Chazournes remarks they are almost like ‘Siamese twins’, thus ‘when one refers to the Paris Agreement, it should be considered alongside the Decision’.⁸ Surprisingly, little attention has been paid to this new phenomenon of law-creation under a framework-cum-decisions approach so far. This article fills this gap and explores how the Conference of Parties (cop) of the United Nations Framework Convention on Climate Change (unfccc), and even more the newly created ‘Conference of Parties serving as the meeting of the Parties to the Paris Agreement’ (cma)⁹ might operate in this venture to develop and enhance future legal action on the climate.

Multilateral environmental treaties regularly rely on the decision-making power of ‘Conferences of Parties’ or ‘Meetings of Parties’ as engines for the development of treaties, especially for the incorporation of latest scientific

- 6 See D. Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *reciel* 142; D. Bodansky, ‘The Paris Climate Change Agreement: A new hope?’ (2016) 110 *ajil* 288; R. Falkner, ‘The Paris Agreement and the new logic of international climate politics’ (2016) 92 *International Affairs* 1107; D. Klein *et al.* (eds), *The Paris Agreement on Climate Change. Commentary and Analysis* (oup 2017); M. Gervasi, ‘Rilievi critici sull’Accordo di Parigi. Le sue potenzialità e il suo ruolo nell’evoluzione dell’azione internazionale di contrasto al cambiamento climatico’ (2016) 71 *La Comunità Internazionale* 21; A. Huszár, ‘Preliminary Legal Issues in the Historic Paris Climate Agreement’ (2016) *Hungarian Yearbook of International Law and European Law* 195; L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *iclj* 493; L. Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations’ (2016) 28 *jel* 337. Further references throughout this article.
- 7 UN fccc cop ‘Report of the Conference of the Parties on its Twenty-first Session, Held in Paris from 30 November to 13 December 2015: Addendum Part Two: Action Taken by the Conference of the Parties at its Twenty-first Session: Decision 1/CP.21 ‘Adoption of the Paris Agreement’ (29 January 2016) FCCC/CP/2015/10/Add.1. The Paris Decision is structured into six subsections and consists of 139 paragraphs.
- 8 L.B. De Chazournes, ‘One Swallow Does Not a Summer Make, but Might the Paris Agreement on Climate Change a Better Future Create?’ (2016) 27 *ejil* 253, 254.
- 9 This is the officially used abbreviation for the ‘Conference of Parties serving as the meeting of the Parties to the Paris Agreement’. ‘cop’ stands for the unfccc Conference of Parties and ‘cmp’ stands for the Conference of Parties serving as the meeting of Parties to the Kyoto Protocol.

evidence, and for the provision of guidance on coherent implementation, with a varying degree of legally binding force.¹⁰ Parties' decisions on these matters tend to be firmly anchored in State consent, and instances where States accept to be bound by stricter rules adopted by a qualified majority vote, are rare.¹¹

Yet the Paris Agreement follows a distinctly different path. The functions and pertinent competences assigned to the cma under the Paris Agreement and the Paris Decision go substantially beyond the traditional role of a Parties' Conference. Unsurmountable negotiating issues at the Paris conference have not been excluded to be then resolved in an additional protocol or amendment. They have been assigned to further strategic cma decisions. As much of the Paris Agreement's provisions remain non-operational, the cma becomes the key driver in the future development of climate change rules. This makes the cma autonomous in the process of continuous decision-making and renders future treaty-making or amendment procedures superfluous.¹²

With issues such as differentiation under the new Agreement, the inclusion of a long-term temperature goal and dynamism, finance, and loss and damage being unresolved up until the conference in Paris in 2015,¹³ the new approach of Parties' continuous strategic decision-making is ostensibly motivated and

10 For a discussion in the literature see J. Brunnée, 'coping with Consent: Law-making under Multilateral Environmental Agreements' (2002) 15 *Ijil* 1; R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *ajil* 623; V. Röben, 'Conference (Meeting) of States Parties' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (oup 2008–), available at { [HYPERLINK "http://www.mpepil.com/"](http://www.mpepil.com/) } \h (last visited 7 June 2018); for a discussion of the development of a new layer of regulatory international law see J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547, at 559.

11 The well-known example, the Montreal Protocol of Substances that Deplete the Ozone Layer, allows adjustments and hence a tightening of obligations, once a chemical is subject to the control mechanism. In an important move to protect the global climate, Parties to the Montreal Protocol agreed in Kigali in 2016 on new binding targets and timetables to phase down harmful hydrofluorocarbons, in accordance with the Protocol's amendment procedure. Art. 9 (4) Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 *unts* 324; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 *unts* 3; Kigali Amendment to the Montreal Protocol (done 23 November 2016) C.N.872.2016.TREATIES-XXVII.2.f.

12 The first session of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (cma 1) took place in Marrakech, Morocco from 15–18 November 2016, the second and third session of cma 1 will take place in 2017 and 2018 respectively.

13 See European Parliament Directorate-General for Internal Policies 'International Climate Negotiations—On the Road to Paris—Issues at Stake in View of cop 21' (2015) 43.

underpinned by the pursuit of efficacy and practicality for many Parties.¹⁴ The concern not to introduce too many new and substantial topics into the Agreement, but to leave these for the Paris Decision, also played an important role.¹⁵ Yet this particular extent of decision-making in conjunction with an international agreement and the prospect of continuous decision-making entails several consequences. First, leaving major substantial issues for Parties' decisions outside the international treaty, diminishes the role of the treaty as a form of international legislation. Second, decisions taken exclusively in the forum of a Parties' conference or meeting lose their potential for entrenchment through treaty law. Third, for many constitutional States, the fact that decision-making processes gravitate towards Parties' conferences or meetings challenges domestic ratification avenues. All three aspects will ultimately be relevant for the contribution and efficiency of international law in the field of climate change.

Recently published studies in the field of environmental science and civil engineering on different scenarios of global warming confirm that only if the long-term temperature goal of the Paris Agreement is reached, will parts of the world such as North-India, Pakistan and Bangladesh remain habitable.¹⁶ A business-as-usual scenario of atmospheric ghg concentrations risks human survivability and if emissions are not reduced significantly, large parts of South Asia could become too hot and humid for humans, resulting in the inevitable risk of mass migration. To make the Paris Agreement deliver the change needed to reduce the impact of climate change, its further concretization through

- 14 The EU position was to adopt 'a comprehensive package of substantive decisions, in addition to a technical work programme, at the Paris Conference to further develop rules, modalities and procedures on inter alia transparency and accountability of mitigation commitments, including for the land-use sector, and on the international use of markets, to be completed by 2017, to enable the implementation of the Paris Agreement', Council of the European Union (18 September 2015) 12165/15, para. 19.
- 15 Position of the United States in accordance with the Byrd-Hagel Resolution 1997, see S.Res.98 – A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, agreed with 95 votes in favour and no vote against it, S. Rept. 105–54; and with the same wording, H.Res.211 – Expressing the sense of the House of Representatives regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, 105th Congress (1997–1998), available at { [HYPERLINK "https://www.congress.gov/bill/105th-congress/senate-resolution/98"](https://www.congress.gov/bill/105th-congress/senate-resolution/98) \h } { [HYPERLINK "https://www.congress.gov/bill/105th-congress/senate-resolution/98"](https://www.congress.gov/bill/105th-congress/senate-resolution/98) \h }(last visited 7 June 2018).
- 16 E.S. Im, J.S. Pal and E.A.B. Eltahir, 'Deadly Heat Waves Projected in the Densely Populated Agricultural Regions of South Asia' (2017) 3 Science Advances 8, available at { [HYPERLINK "http://advances.sciencemag.org/content/advances/3/8/e1603322.full.pdf"](http://advances.sciencemag.org/content/advances/3/8/e1603322.full.pdf) \h } { [HYPERLINK "http://advances.sciencemag.org/content/advances/3/8/e1603322.full.pdf"](http://advances.sciencemag.org/content/advances/3/8/e1603322.full.pdf) \h }

"<http://advances.sciencemag.org/content/advances/3/8/e1603322.full.pdf>" \h j (last visited 7 June 2018).

cma decisions, especially law-making decisions, must not only be certain and efficient but also accepted widely and in the long term by all its Parties, stakeholders and of course, the public.

This article makes four main arguments. First, the cma is endowed with two interlocking functions, on the footing of the Paris Agreement and the Paris Decision: to exercise oversight over Parties' efforts and to steer their conduct towards a common goal. Each of these functions will be fulfilled through strategic decisions of the cma, based on competences assigned to it. Second, these cma decisions can be legally binding on Parties, in accordance with international law. This concerns the inner-systemic aspect of taking the Agreement forward through infra-treaty law. Third, cma decisions also have an external effect.¹⁷ These external consequences go beyond the multifaceted influence that action in an international forum may generally have on national administrations. Strategic cma decisions cause the need for further legal action outside the international legal regime. This perpetuates the impact of strategic cma decisions. The European Union legal order, with the proposed governance of the European Energy Union, exemplifies this. Fourth, continuous strategic decision-making of the cma has implications for aspects of legal certainty and legitimacy of law-making under the Paris Agreement.

The article is structured as follows: the following Part ii starts with a discussion of the oversight function of the cma under the Agreement. It first focuses on how the Agreement bridges the gap between the bottom-up approach, self-perception by Parties, and the global stocktake procedure. It demonstrates that the cma gains significant control over nationally determined contributions as the foundation of mitigation efforts through this procedure and that it has the competence to decide to adjust the overall target within the given margin of 1.5°C and 2°C. The part then turns to the function of the cma in steering Parties' conduct through its assigned competences in relation to adaptation, finance, compensation and compliance.

Part iii scrutinizes the legal consequences that cma decision-making may have. It first explains the legal implications of whether a decision is adopted under the unfccc by the 'Conference of Parties' (cop), under the Kyoto Protocol by the 'Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol' (cmp) or under the Paris Agreement by the cma. The composition of these groups of Parties varies, for instance the United States will remain part of the cop, but not of the cma, once withdrawal from the Paris

¹⁷ See for the distinction between the internal and external sphere J.E. Alvarez, *International Organizations as Law-makers* (oup 2006) 120.

Agreement becomes effective.¹⁸ It also matters in relation to the legal consequences of decisions of Parties, for questions such as compliance of a Party with assigned emission allowances. This part then sets out general criteria for the qualification of cma decisions as legally binding in international law.

Part iv examines the external sphere, using as reference the influence of cma decision-making on the governance of the European Energy Union as contained in the Proposal for a Regulation of the European Parliament and the Council of November 2016.¹⁹

Part v explores the consequences that law-making through decisions will have on the traditional differentiation between a law-making treaty and subsequent implementing decisions, under the aspect of legal certainty of international action to protect the climate. It also identifies the closely related yet distinct question of legitimacy that arises from this new approach of international regulation. It highlights that extensive decision-making by Parties through the cma requires a re-thinking of the delicate balance between the prerogative of national governments and the participation of national parliaments in international decision-making.

The conclusions in Part vi summarize the findings.

ii Interlocking Functions of the cma: Exercising Oversight and Steering Conduct

For the first time in international climate action, the Paris Agreement spells out in its Art. 2 (1) (a) a temperature objective to enhance the implementation of the unfccc. It aims at ‘holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change’. To achieve this temperature goal, the Agreement combines Parties’ self-perception (1.) with interlocking functions of the cma, to exercise

¹⁸ Art. 28 of the Agreement stipulates that a Party may withdraw from the Agreement any time after three years from the date on which the Agreement has entered into force for that Party. The withdrawal shall then take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal. Up to that time, a Party remains obligated to fully comply with the Agreement, Art. 70(1)(a) Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 unts 331.

¹⁹ Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, com(2016) 759 final.

oversight through the global stocktake (2.) and through transparency (3.) and to develop mechanisms to steer Parties' conduct (4.).

1 *The Bottom-up Approach for Mitigation, Progression and Limits of Self-perception*

The Agreement trusts in contributions by all Parties. In accordance with the decision 1/CP.20, Parties to the unfccc had submitted so called 'intended nationally determined contributions' (indcs) to demonstrate their plans for post-2020 climate action.²⁰ Following up on these initial pledges, each Party shall prepare, communicate and maintain a 'nationally determined contribution' (ndc) every five years, Art. 4 (2) Paris Agreement. In June 2018, 172 Parties had submitted their first ndcs.²¹ Domestic mitigation shall be pursued with the aim to achieve the objective of such contributions, Art. 4 (2) sentence 2. As Daniel Bodansky explains, this does not necessarily mean that each Party is required to implement the ndc, as the point of reference is the objective of such contribution, not the contribution itself.²² In fact, this pinpoints that the provision of the Agreement, read on its own, does not specify what is expected from Parties. Even though it is framed as a legally binding rule, the objective of the ndc as the benchmark for mitigation efforts remains vague.

Much will depend on how the cma will define the necessary elements of an ndc. Neither the Agreement nor the Paris Decision define the exact content that an ndc should have. Instead, the Agreement addresses the importance of cma decisions for defining relevant information to be submitted by Parties with their pledges. In communicating their ndcs, 'all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with Decision 1/CP.21 and any relevant cma decision', Art. 4 (8). The Paris Decision identifies information that Parties may include, as appropriate, such as quantifiable information on the reference point, time frames and methodological approaches and assigns the competence to the cma to adopt guidance to further facilitate the clarity, transparency and understanding of ndcs.²³ The

20 They were available at { [HYPERLINK "http://unfccc.int/focus/items/10240.php"](http://unfccc.int/focus/items/10240.php) \h } (last visited 16 October 2017), no longer available online as of June 2018.

21 Available at { [HYPERLINK "http://www4.unfccc.int/ndcregistry/Pages/All.aspx"](http://www4.unfccc.int/ndcregistry/Pages/All.aspx) \h } (last visited 7 June 2018).

22 D. Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *reciel* 142, at 146.

23 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, paras 27, 28. See also the views expressed by Parties at the resumed first session May 2017, Informal Note by the Co-Facilitators Agenda item 3 – Further guidance in relation to the mitigation section of decision 1/CP.21, available at { [HYPERLINK "http://unfccc.int/files/bodies/apa/application/pdf/cofacilitators_note_1_apa_3_15052017_for_publication.pdf"](http://unfccc.int/files/bodies/apa/application/pdf/cofacilitators_note_1_apa_3_15052017_for_publication.pdf) \h } { [HYPERLINK "http://unfccc.int/files/bodies/apa/application/pdf/cofacilitators_note_1_apa_3_15052017_for_publication.pdf"](http://unfccc.int/files/bodies/apa/application/pdf/cofacilitators_note_1_apa_3_15052017_for_publication.pdf) \h } (last visited 7 June 2018).

cma also has the mandate to adopt ‘guidance on features’ of ndcs.²⁴ The Ad Hoc Working Group on the Paris Agreement (apa) is to develop both sets of guidance, to be then adopted at the first session of the cma.²⁵ Whether the guidance will be legally binding or just a strong recommendation, depends on the exact wording and cannot be extrapolated from the meaning of the word ‘guidance’ as such. The cma could adopt legally binding guidance on features that clarify the content of the ndc, such as the contribution that the Party intends to achieve, the relevant timeframe, the policy and legal framework.²⁶

It is likely that this guidance will narrow the leeway for interpretation of the rule that mitigation efforts shall be pursued with the aim to achieve the objective of the ndc, so that it will become rather difficult for Parties to justify a scenario where mitigation measures are not designed to implement their ndcs. For Parties whose ndcs contain absolute ghg emission targets, a differentiation between implementing the objective of their ndc and the ndc itself may already prove to be impossible.²⁷

The Paris Agreement demands ambition and claims that each successive contribution ‘will represent a progression’, Art. 4(3), and each Party may at any time adjust its contribution to enhance its level of ambition, Art. 4(11). Two different approaches are established to ensure that successive ndcs will be more ambitious than the previous ndc: a normative expectation of progression and the global stocktake as collective oversight mechanism, in which the cma will play a major role.

First, the Agreement lays down a normative expectation against which a backsliding or a pledge below the economic capabilities of States will be extremely difficult to justify. The expectation is that the ambition for each ndc

24 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 26.

25 Decision 1/CMA.1, Matters relating to the implementation of the Paris Agreement, UN Doc FCCC/PA/CMA/2016/3/Add.1, 5: ‘third part of the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to be convened in conjunction with the twenty-fourth session of the Conference of the Parties (December 2018)’.

26 See for instance, Canada’s Submission on apa Item 3 Features, up-front information & accounting for Nationally Determined Contributions, available at { http://www4.unfccc.int/Submissions/Lists/OSPSubmissionUpload/175_279_131196434376977581-APA%20Item%203%20-%20Canada%20English%20-%20NDCs%20-%20Sept%2027%202016.pdf } { http://www4.unfccc.int/Submissions/Lists/OSPSubmissionUpload/175_279_131196434376977581-APA%20Item%203%20-%20Canada%20English%20-%20NDCs%20-%20Sept%2027%202016.pdf } { http://www4.unfccc.int/Submissions/Lists/OSPSubmissionUpload/175_279_131196434376977581-APA%20Item%203%20-%20Canada%20English%20-%20NDCs%20-%20Sept%2027%202016.pdf } (last visited 4 June 2018).

- 27 This is the case for the EU (binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990); Australia submitted an economy-wide ghg emission reduction target; China announced that by 2020 it will lower carbon dioxide emissions per unit of gdp by 40% to 45% from the 2005 level, increase the share of non-fossil fuels in primary energy consumption to about 15%, available at the Interim Registry, { **HYPERLINK** "http://www4.unfccc.int/ndcregistry/Pages/All.aspx" \h }(last visited 4 June 2018).

will increase with each successive ndc and that it will reflect the highest possible ambition. Progression in the Agreement could be qualified as a new principle of ‘non-regression—never below the target, always above’, or it could even be read as a new principle of progression.²⁸ The expectation of progression is related to two parameters: time and improved capacities. Progression over time aims at accelerating ambition just because time has progressed. Once a ndc has been made, one could argue that a Party is legally obliged to improve upon this. However, progression in relation to improved capacities will remain rather difficult to confine. The Paris Agreement employs the principle of common but differentiated responsibilities in a slightly nuanced fashion and allows Parties to determine their progression ‘in the light of national circumstances’.²⁹ This is a dynamic reference that underlines the normative expectation that contributions will rise in accordance with improved national circumstances. However, there is no definition of the term ‘different national circumstances’. Some clarity on the direction of Parties’ progression can be derived from the still applicable developed country Parties/developing country Parties divide. For developed country Parties, the objective is that they ‘should take the lead in undertaking economy-wide absolute emission reduction targets’.³⁰ The term ‘shall’ of an earlier draft³¹ was replaced by the expression ‘should’ at the last minute as a response to the strong resistance of the United States to make it a binding obligation.³² Developing country Parties are only expected to move over time towards economy-wide emission reduction targets. Some pressure on all Parties will be exerted through the transparency of the public register, where all ndcs will be recorded. Modalities for its

28 L.B. De Chazournes, ‘One Swallow Does Not a Summer Make, but Might the Paris Agreement on Climate Change a Better Future Create?’ (2016) 27 *ejil* 253, at 254.

29 Paris Agreement, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 Art. 2 (2); Art. 4 (3). It represents a compromise between China and the US, see L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *iclj* 493, 508.

30 The principle that developed country Parties should take the lead in combating climate change and the adverse effects thereof is already established in Art. 3 (1) of the unfccc.

31 ‘Adoption of the Paris Agreement. Proposal by the President’ (12 December 2015) UN Doc FCCC/CP/2015/L.9.

32 Byrd-Hagel Resolution 1997, S.Res.98. A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, agreed with 95 votes in favour and no vote against it, S.Rept. 105–54, available at { [HYPERLINK "https://www.congress.gov/bill/105th-congress/senate-resolution/98"](https://www.congress.gov/bill/105th-congress/senate-resolution/98) } (last visited 7 June 2018). A new international agreement on climate change can only produce binding commitments for the United States if major developing countries are included and U.S. competitiveness is not adversely influenced by the international agreement.

operation will be adopted by the cma, in accordance with the Paris Decision.³³ This transparency is employed as means to influence ambition, since action or inaction of a Party will be visible and bound to affect other Parties.³⁴ Any increase in ambition by a Party eases the pressure for the community of Parties. Indeed, Parties have already proven to be prepared to take on more ambitious targets if they can expect with a degree of certainty that other Parties adhere to equally ambitious contribution commitments.³⁵

In a second move, and to win back more effective control over nationally perceived ambition capacities, the Agreement does not rely upon this normative expectation alone. Rather, the overall progress in achieving the temperature goal, increasing the ability to adapt to adverse effects of climate change and making finance flows consistent, will be assessed in a dedicated global stocktake procedure.

2 *The Global Stocktake: Can the cma Improve Ambition?*

Art. 14 (1) of the Agreement tasks the cma to periodically take stock of the implementation of the Agreement. The cma has far-reaching competences concerning the timeframe, starting date, input and outcome of the global stocktake. The process is designed to assess the collective progress of Parties towards achieving the purpose of the Agreement and its long-term goals. The aim is not to review the contribution of a single State. Under consideration are mitigation and adaptation efforts and ‘the means of implementation and support in the light of equity and the best available science’, Art. 14(1). According to the Agreement, the first global stocktake shall be undertaken in 2023 and every five years thereafter, if not otherwise decided by the cma, Art. 14(2). The outcome of the global stocktake shall inform Parties in updating and enhancing their ndcs, Art. 14(3) of the Agreement. Thus, the global stocktake comes full circle: not only will all ndcs be assessed by the cma in the global stocktaking, the outcome of the global stocktake shall also inform Parties in updating and enhancing their contributions.

There are two points worthy of mention in relation to the timeframe of the global stocktake. First, the Paris Decision assigns competence to the cma to adjust the periodic time frame. Second, the Paris Decision indicates an earlier

33 Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, paras 29, 30.

34 P. Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28 *ejil* 19, at 22.

35 See for instance the pledges made by countries like Switzerland, Norway, Liechtenstein and the EU, Doha amendment to the Kyoto Protocol, Art. 1: Amendment A. Annex B to the Kyoto Protocol, n 7, 9, 10, 11. Available at { [HYPERLINK "https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf"](https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf) } { [HYPERLINK "https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf"](https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf) } (last visited 2 June 2018).

beginning of the global stocktake than the Paris Agreement, with a view to start a facilitative dialogue among Parties in 2018 to take stock of the collective efforts in relation to the long-term temperature goal, and to inform the preparation of ndcs.³⁶ As part of this facilitative dialogue, the implementation efforts of developed country Parties regarding their quantified economy-wide emission reduction target under the Convention and, if also a Party to the Kyoto Protocol, its quantified emission limitation or reduction commitment for the second commitment period of the Kyoto Protocol, will be conducted with a view to identifying ways to enhance ambition in mitigation by all Parties.³⁷ This will be accompanied by a special report of the Intergovernmental Panel on Climate Change (ipcc)³⁸ in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global ghg emissions pathways.³⁹ Parties whose ndcs contain a timeframe beyond 2020, are then required to update their contributions in 2020 and five yearly afterwards.⁴⁰

How exactly the global stocktake will inform future ndcs is not specified in the Agreement. In the Paris Decision, however, the cop gives detailed guidance for developing the global stocktake procedure further, through endowing the cma with the competence to decide on ‘sources of input’⁴¹ and modalities of the global stocktake.⁴² Scientific assessments of the ipcc also inform the global stocktake.⁴³ The cop has already expressed its concern in the Paris Decision that the estimated aggregated emission levels for 2025 and 2030, based on pledges so far, do not fall within the least-cost 2°C scenario, not to mention the most ambitious 1.5°C target.⁴⁴ What are the potential consequences of such a conclusion? How can the cma respond under the Agreement and the

36 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 20.

37 Paris Decision, *ibid.*, para. 115, referring to 1/CP.19, paras 3 and 4, see FCCC/CP/2013/10/Add.1.

38 The Intergovernmental Panel on Climate Change (ipcc) assesses and reports on the scientific basis of climate change. It advances the scientific knowledge on climate change. ipcc Reports are extremely relevant for policy development but not prescriptive.

39 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, paras 20, 21.

40 Paris Decision, *ibid.*, paras 23, 24.

41 ‘Including, but not limited to: (a) Information on: (i) The overall effect of the nationally determined contributions communicated by Parties; (ii) The state of adaptation efforts, support, experiences and priorities from the communications referred to in Art. 7, paras 10 and 11, of the Agreement, and reports referred to in Art. 13, para. 8, of the Agreement; (iii) The mobilization and provision of support; (b) The latest reports of the Intergovernmental Panel on Climate Change; (c) Reports of the subsidiary bodies’, Paris Decision, *ibid.*, para. 99.

42 Paris Decision, *ibid.*, para. 101.

43 Paris Decision, *ibid.*, para. 100.

44 Paris Decision, *ibid.*, para. 17.

Paris Decision? The cma could inform Parties in the facilitative dialogue, even before 2020, that the nationally determined contributions are not ambitious enough. Furthermore, the cma might even indicate that, in accordance with scientific evidence, the temperature goal within a scope of 0.5°C, between 1.5°C and 2°C should be adjusted, to drive greater ambition.⁴⁵ The competence of the cma to do so can be found in Art. 2 (2) of the Agreement, in conjunction with Art. 14 (3), given the fact that the Agreement sets out a temperature range, and the role of the cma in enhancing contributions. Even though the Agreement adopts a bottom-up approach, the cma has the power through the global stocktake to inform Parties that their *collective* efforts are not sufficient to reach the upper limit of the temperature – objective that the Agreement sets forth, let alone the lower and more aspirational goal of 1.5°C.⁴⁶ From a legal point of view, the cma has the competence to adjust the temperature goal as the point of reference for the global stocktake, without the need of a further formal treaty amendment. It is a completely different question, however, whether the cma will also have the political commitment, to do so.

3 *Controlling National Implementation through the Transparency Framework*

While the global stocktake aims at controlling collective progress towards achieving the purpose and the long-term goals of the Agreement, the enhanced transparency framework is more concerned with tracking progress towards achieving Parties' individual ndcs. The transparency framework has reporting obligations for all Parties at its heart, Art. 13 (1) Paris Agreement. Its concrete shape and especially the important decision on provision of flexibility for some Parties lies largely in the hands of the cma.

The Agreement abandons the differentiation of reporting requirements on mitigation efforts for developed and developing countries in favour of a robust 'one size fits all' approach, with general flexibility only allowed for those

⁴⁵ Paris Decision, *ibid.*, para. 21: 'Invites the Intergovernmental Panel on Climate Change to provide a special report in 2018 on the impacts of global warming of 1.5°C above, pre-industrial levels and related global greenhouse gas emission pathways'. The ipcc announced on 21 September 2017 that the Special Report on Global Warming of 1.5°C will be released in early October 2018, available at { [HYPERLINK "http://www.ipcc.ch/news_and_events/ST-clarifying_IPCC_role_1.5C.shtml"](http://www.ipcc.ch/news_and_events/ST-clarifying_IPCC_role_1.5C.shtml) } { [HYPERLINK "http://www.ipcc.ch/news_and_events/ST-clarifying_IPCC_role_1.5C.shtml"](http://www.ipcc.ch/news_and_events/ST-clarifying_IPCC_role_1.5C.shtml) } (last visited 6 June 2018); see also the Communication from the Commission to the European Parliament and the Council, com (2016) 110 final, at 3: 'The aspirational goal of 1.5°C was agreed to drive greater ambition'.

⁴⁶ The estimated aggregate annual global emission levels resulting from implementing the initial ndcs would in accordance with a report of the Secretariat not fall within the least-cost 2°C scenarios by 2025 and 2030, Synthesis report on the aggregate effect of the intended nationally determined contributions, UN Doc FCCC/CP/2015/7, Figure 2 and para. 39.

developing country Parties that need it, Art. 13 (2). The purpose of the framework is to understand climate change action towards achieving the purpose of Art. 2 unfccc, Art. 4 Paris Agreement and to track progress towards achieving Parties' ndcs, Art. 13 (5). Information should be submitted regularly and designed to inform the global stocktake. The rather important term 'regularly' is not defined in the Agreement but further clarified in the Paris Decision. Except for the least developed country Parties and small island developing States, it means that information shall be submitted not less frequently than biennially.⁴⁷ All Parties must submit their national inventory report of ghg emissions and removals and provide information necessary to track progress in relation to their ndc, Art. 13 (7). Reporting on financial support also obliges developed country Parties to communicate biennially indicative and qualitative information on projected levels of public financial resources, technology and capacity building support, aimed at supporting developing country Parties, Art. 13 (9), Art. 9 (5). The cma has the competence to strengthen this requirement, as it will decide on further details of information on the provision of financial support.⁴⁸

All reports will undergo the same Expert Review, Art. 13 (11) as does the information submitted by developed country Parties on financial support, technology transfer and capacity building provided to developing country Parties, Art. 13 (9), (11). Each Party is also under the obligation to participate in a facilitative, multilateral consideration of progress, in relation to the provision of financial support and the achievement of its ndc, Art. 13 (11).

One major issue is that the definition of 'flexibility' in relation to the obligation of reporting for developing country Parties is not clarified in the Agreement. This will be decided by the cma. The Paris Decision defines that the least developed country Parties and small island developing States are exempted from the biennial reporting timeframe.⁴⁹ However, for Parties that are part of

47 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 90. Small Island Developing States (sids) are a coalition of low-lying islands with a vulnerability to sea-level rise. Developing Countries, including China and India, had argued for a continuation of the differentiation reporting system, that places stricter requirements on developed country Parties, but developed country Parties, mainly the EU and the Umbrella Group succeeded with their proposal for a uniform transparency framework. The Umbrella Group was formed after the adoption of the Kyoto Protocol and consists normally (no formal membership) of Australia, Belarus, Canada, Iceland, Israel, Japan, New Zealand, Kazakhstan, Norway, the Russian Federation, Ukraine and the United States.

48 Paris Decision, *ibid.*, para. 55.

49 Paris Decision, *ibid.*, para. 90. Developing Countries, including China and India, had argued for a continuation of the differentiation reporting system, that places stricter requirements on developed country Parties, but developed country Parties, such as the United States and the EU with the Umbrella Group, succeeded with their proposal for a uniform transparency framework.

the group of developing country Parties, but not included in the group of least-developed country Parties and small islands States, flexibility may also involve a different frequency of reporting. The Paris Decision provides that flexibility shall be provided in relation to ‘scope, frequency and level of detail of reporting, and in the scope of review’.⁵⁰ Flexibility in relation to the scope of review is then further specified in the Paris Decision. It could imply that in-country reviews remain optional for developing country Parties. The operation of these flexibilities depends on how flexibility will be reflected in the modalities, procedures and guidelines for reporting, that will be adopted in a decision of the cma.⁵¹ One option could be to establish tiered reporting requirements, with a varying degree of stringency, depending on Parties’ capacities.⁵²

Reporting on any progress of implementation efforts requires accurate, comparable and consistent accounting for Parties’ ndcs, Art. 4 (13). The Agreement’s approach to accounting corresponds with reporting obligations and, as such, marks a departure from the Convention’s differentiation between developing and developed country Parties. The Paris Decision contains detailed information on the accounting of nationally determined contributions. This comprises the expectation to strive to include all categories of anthropogenic emissions or removals in their nationally determined contributions and, once a source, sink or activity is included, continue to include it, and to provide an explanation of why any categories are excluded.⁵³ The Paris decision confers the competence to decide on accounting guidance on the cma. Future guidance on accounting will be drawn from existing approaches and thus be closely linked with relevant guidelines.⁵⁴ Whether this guidance will be legally binding or a strong recommendation, remains to be seen. The Agreement leaves this decision to the cma.⁵⁵

50 Paris Decision, *ibid.*, para. 89.

51 Paris Decision, *ibid.*, paras 89 and 91.

52 J. Huang, and A. Mansell, ‘Key Issues in Completing the Paris Climate Architecture’ (Center for Climate and Energy Solutions 2016), available at { [HYPERLINK "https://www.c2es.org/docUploads/key-issues-completing-paris-climate-architecture.pdf"](https://www.c2es.org/docUploads/key-issues-completing-paris-climate-architecture.pdf) \h } { [HYPERLINK "https://www.c2es.org/docUploads/key-issues-completing-paris-climate-architecture.pdf"](https://www.c2es.org/docUploads/key-issues-completing-paris-climate-architecture.pdf) \h } (last visited 29 September 2017).

53 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 31 (c), (d).

54 Paris Decision, *ibid.*, para. 31: ‘Requests the Ad Hoc Working Group on the Paris Agreement to elaborate, drawing from approaches established under the Convention and its related instruments, as appropriate, guidance for accounting for Parties’ nationally determined contributions...’.

55 L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *iclj* 493, 499, remarks that ‘much will depend on the terms – mandatory or discretionary – in which the decision is drafted’.

4 *Steering Conduct and the Role of the cma in Designing Mechanisms*

The second function of the cma is to steer the actual conduct of Parties. To this effect, the cma will adopt decisions on adaptation, compensation, financial support and compliance procedure.

a Adaptation

The Paris Agreements acknowledges that adaptation is a global challenge faced by all, while emphasizing that it is an immediate and major priority for developing country Parties that are particularly vulnerable to the adverse effects of climate change, Art. 7 (2). Parties have recognized that greater levels of mitigation contribute to lowering adaptation needs, Art. 7 (4). As part of the global stocktake, adaptation efforts will be reviewed, Art. 7 (14). This includes recognizing adaptation efforts of developing country Parties, Art. 7 (14) (a). In addition, adaptation action as reported in the respective communication will be enhanced, Art. 7 (14) (b) and the effectiveness of the support that is provided for adaptation will be reviewed, Art. 7 (14) (c).

While the Agreement sets out the framework on adaptation, the development of further details on the review process fall within the competence of the cma. Modalities for the recognition of adaptation efforts of developing country Parties will be adopted by the cma.⁵⁶ The cma will also adopt methodologies for assessing adaptation needs of developing country Parties.⁵⁷ The Paris Agreement does not specify any details on the facilitation of support that is provided for developing country Parties. The Paris Decision assigns the competence to the cma to decide on methodologies on ‘taking the necessary steps to facilitate the mobilization of support for adaptation in developing countries in the context of the limit to global average temperature increase referred to in Art. 2 of the Agreement’.⁵⁸ This is a broad mandate concerning the distribution of support. It may include a further decision on how support is provided, how much and to which Party. In relation to the reference ‘in the context of the global average temperature increase’, it remains unclear, whether the lower or the upper limit of the temperature range given in Art. 2 of the Agreement marks the relevant standard.

When reviewing the overall progress on adaptation in the global stocktake, the cma could decide whether the support provided is sufficient, and whether it is effectively used.

⁵⁶ Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 41.

⁵⁷ Paris Decision, *ibid.*, para. 42 (b).

⁵⁸ Paris Decision, *ibid.*, para. 45 (a).

b Finance

The Paris Agreement does not include a quantified goal on finance. Parties made provision for this in the Paris Decision instead, and they also endowed the cma with the competence to set a new quantified goal based on the existing one prior to 2025.

The provision on finance reiterates the fact that mitigation and adaptation are the main fundamentals of future climate actions. It states that developed country Parties shall provide financial resources for developing country Parties with respect to both, mitigation and adaptation, Art. 9 (1) Paris Agreement. The financial mechanism under the unfccc shall also serve as the financial mechanism of the Agreement, Art. 9 (8).⁵⁹ The Agreement extends the circle of contributors, in adding to the existing obligation of developed country Parties the voluntary contribution of other Parties, who are also encouraged to provide support, Art. 9 (2).

As already mentioned in relation to mitigation and adaptation, the Agreement adds a new reliance on progression of States overall⁶⁰ which manifests itself in various provisions,⁶¹ each being conducive to promoting the global climate goal. In a similar vein, this applies to the provision of financial support to developing countries. The mobilization of climate finance funds should represent progression of efforts in accordance with Art. 9 (3). Developing country Parties should receive scaled up financial resources with the aim to balance mitigation and adaptation efforts, Art. 9 (4). Yet further specification on concrete amounts is given only in the Paris Decision.⁶² The target for developed country Parties is set to jointly providing US\$100 billion annually through to 2025.⁶³ A new collective quantified goal starting with a baseline of US\$100 billion a year, that takes the needs and priorities of developing countries into account, is to be identified by the cma prior to 2025.

The Agreement uses mandatory language when requiring developed country Parties to provide biennially⁶⁴ information on their provision of predictive

⁵⁹ Paris Decision, *ibid.*, para. 58.

⁶⁰ Paris Agreement, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, Art. 3, 2nd sentence 'The efforts of all Parties will represent a progression over time...', and Art. 4 paragraph 19 envisages long-term greenhouse gas emission development strategies.

⁶¹ Paris Agreement, *ibid.*, Art. 4 (3), (4), Art. 9 (3).

⁶² To move this into the decisions mark a compromise between developing and developed country Parties, L. Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *iclj* 493, at 512.

⁶³ Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, paras 53 and 114.

⁶⁴ It is worth to mention that the timeframe for the fulfilment of all other informational requirements was decided outside the Agreement, see Paris Decision, *ibid.*, para. 90.

funding through giving indicative quantitative and qualitative details which will then be considered in the global stocktake, Art. 9 (5), (6). Informational requirements for Parties who are not legally required to contribute to financial support, remain non-mandatory. The Agreement does not prescribe clearly which information developed country Parties must submit to ensure that finance flows are predictable for developing country Parties. The Paris Decision clarifies that financial resources provided by developed country Parties must enable climate change actions of developing country Parties for mitigation and adaptation efforts that contribute to the achievement of the purpose of the Agreement as defined in Art. 2.⁶⁵ The cma has the competence to identify and decide which information will be necessary to make finance flows predictable.⁶⁶

Thus, the cma will decide on the collective quantified goal of Parties and it will also influence how financial support is provided, and the Paris Decision and not the Paris Agreement that make provision for both competences.

c Compensation

The so called 'Warsaw International Mechanism for Loss and Damage' (wim) is also incorporated into the Paris Agreement, Art. 8.⁶⁷ This has several consequences, and the role of the mechanism in the future will depend on further decision-making of the cma. By including the wim, Parties acknowledge that next to mitigation and adaptation, the wim needed to be a self-standing concept, under which loss and damage could be addressed, in instances where mitigation and adaptation are not sufficient. Originally, the wim had been established under the Cancun Adaptation Framework and developed country Parties wished to see it included as part of the adaptation pillar only.⁶⁸ The wim was thus upgraded in Paris. Furthermore, it is now operated under the authority and guidance of the cma, giving the cma the option to enhance and strengthen the mechanism, Art. 8(2).

⁶⁵ Paris Decision, *ibid.*, para. 52.

⁶⁶ Paris Decision, *ibid.*, para. 55.

⁶⁷ See for the history of the mechanism M.J. Mace, and R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 *reciel* 197; L. Rajamani, 'Addressing Loss and Damage from Climate Change Impacts' (2015) *Economic & Political Weekly*, available at http://www.cprindia.org/sites/default/files/articles/Addressing_Loss_and_Damage_from_Climate_Change_Impacts.pdf \h } { [HYPERLINK "http://www.cprindia.org/sites/default/files/articles/Addressing_Loss_and_Damage_from_Climate_Change_Impacts.pdf" \h } { HYPERLINK "http://www.cprindia.org/sites/default/files/articles/Addressing_Loss_and_Damage_from_Climate_Change_Impacts.pdf" \h }](http://www.cprindia.org/sites/default/files/articles/Addressing_Loss_and_Damage_from_Climate_Change_Impacts.pdf) (last visited 7 June 2018).

⁶⁸ Decision 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1. For the position of the US see [HYPERLINK "http://unfccc.int/files/documentation/submissions_from_parties/adp](http://unfccc.int/files/documentation/submissions_from_parties/adp)

/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf" \h } { HYPERLINK
"http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf" \h } { HYPERLINK
"http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf" \h }(last visited 7 June 2018).

The function of the wim is to address loss and damage associated with impacts of climate change, through enhancing understanding, action and support, Art. 8 (1), (3). The Executive Committee of the wim, the so-called wim ExCom, received the mandate in the Paris Decision to establish a clearing house that serves as a repository for information on insurance and risk transfer, for Parties to develop comprehensive risk management strategies.⁶⁹ This operates now under the cma.

Parties declared their intention to create a mechanism with a pioneering and catalytic nature to promote the implementation of approaches to address loss and damage and they also recognized the role of sustainable development in reducing the risk of loss and damage.⁷⁰ The Agreement gives some guidance for the areas of cooperation, action and support.⁷¹ Read on its face, this general outline of the wim may spark the assumption that the mechanism introduces a new liability rule into the climate change regime. However, the Paris Decision explicitly excludes this option, stating that ‘Art. 8 of the Agreement does not involve or provide a basis for any liability or compensation’.⁷² What exactly this cop decision excludes from the wim is, however, not as clear as it might seem at a first glance. It could even be argued that this decision does not at all affect the capacity of the wim to develop over time a scheme that provides for financial compensation for loss and damage within liability rules.⁷³ From the perspective of competence allocation, it is questionable whether the mentioned cop decision can indeed bind future decision-making of the cma under the Paris Agreement.

Yet the disclaimer in relation to liability in the Paris Decision made the inclusion of the wim in its present form into the Agreement acceptable for developed country Parties. This alone marks progress in two respects. First, it acknowledges that losses and damages will occur, even if the mitigation and adaptation efforts of Parties bring the world on track for the temperature range-goal of Art. 2 of the Agreement. Second, and even more importantly,

69 Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 48. For the latest report and how the mandate is operationalized see UN Doc FCCC/SB/2017/1.

70 Decision 3/CP.22, UN Doc FCCC/CP/2016/10/Add.1.

71 Paris Agreement, Decision, 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, Art. 8 (4) lists: ‘Early warning systems, Emergency preparedness, slow onset events, events that may involve irreversible and permanent loss and damage, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses, resilience of communities, livelihoods and ecosystems.’

72 Paris Decision, *ibid.*, para. 51. ⁶⁹Please check the unpaired quotation mark in the sentence “...warning systems, Emergency preparedness”.

73 M.J. Mace, and R. Verheyen, ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ (2016) 25 *reciel* 197, at 201.

States have acknowledged that they are *collectively* accountable for dispersed loss and damage, without as yet accepting elements of private actors' or let alone State liability. The emphasis is less on identifying a single actor's responsibility than to find ways of addressing and minimizing risks that remain despite mitigation and adaptation efforts.

The future of the wim has yet to be crafted through the cma, and this is the interesting point for the present argument: the Paris Agreement sets out only the basic parameters for the wim, the narrative for its purpose. It indicates that there are many areas of cooperation which would contribute to improving risk assessments. However, the Agreement then leaves the decision on how this is to be achieved and whether the wim may include liability elements in the future, to the discretion of the cma.

d Transferring Compliance Control and the Carbon Market

The following section discusses whether the cma may exercise compliance control over the actual conduct of Parties through the carbon market. Although the Paris Agreement does not explicitly refer to market-based approaches, it recognizes that some Parties may 'use internationally transferred mitigation outcomes towards nationally determined contributions' for which 'robust accounting' must be ensured, Art. 6(2). From the wording of the provision, it is not clear whether the use of internationally transferred mitigation outcomes will follow the market-based approaches of the Kyoto Protocol. Two questions arise from this. First, will the carbon market be linked with the compliance procedure, and second, how will the Paris carbon market contribute to mitigation outcomes after the second commitment period under the Kyoto Protocol ends in 2020.

Under the Kyoto Protocol, Parties have been realizing compliance with climate targets through two main pillars, established by the cmp: the compliance procedure⁷⁴ and the market mechanisms. Both are intertwined. The market mechanisms encompass Joint Implementation, Art. 6, the Clean Development mechanism, Art. 12, and Emission Trading, Art. 17 of the Kyoto Protocol. Developed country Parties with quantified emission reduction targets undergo an expert review process. This scrutinizes compliance with standardized reporting criteria on ghg inventory reports. During the review process, the Compliance Committee may become involved. This committee addresses the question of

74 Art. 18 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 2303 unts 148; Decision 27/CMP.1 approved and adopted the procedures and mechanisms relating to compliance under the Kyoto Protocol, UN Doc FCCC/KP/CMP/2005/8/Add/3, 92.

compliance through either the facilitative or enforcement branch, depending on the gravity of the respective irregularities.⁷⁵ The verdict of non-compliance by the enforcement branch can be sanctioned with a temporary suspension of the right to participate in the market mechanisms until compliance is re-instated.⁷⁶ This excludes the Party concerned from the use of market-based ghg emission reduction units to ensure their climate target is met.

Asthis is an effective but controversial means of implementation control, the Paris Agreement refrains from providing for a compliance procedure similar to the Kyoto Protocol, thereby paying tribute to concerns across developing and developed countries that the invasive non-compliance consequences could be extended post 2020.⁷⁷ While Art. 15 of the Agreement establishes a mechanism to facilitate implementation and promote compliance, it emphasizes the facilitative nature and excludes any adversarial and punitive approaches. In further contrast to the Kyoto Protocol, the Agreement falls short of detailing the consequence of non-compliance through a list of consequences for various degrees of non-compliance. It simply authorizes the cma to adopt the modalities and procedures for the operation of the compliance committee, which then reports to the cma annually, Art. 15 (3). Given this layout, it becomes rather unlikely that the Kyoto compliance mechanism and procedure will be continued. However, how the new Compliance Committee and procedure under the Agreement will be structured and operated remains unclear. It is worth mentioning that the Kyoto Protocol would require an amendment for any procedures and mechanisms in relation to compliance control which entail binding consequences, Art. 18 Kyoto Protocol.⁷⁸ Yet, this restriction is not repeated in the wording of the Paris Agreement. It may be that this was considered dispensable given the

75 UN Doc FCCC/KP/CMP/2005/8/Add. 3, 96, vi, see for instance CC-2009-1-8/Croatia/EB para. 3 (e). However, any Party may submit such a question with respect to itself or with respect to another Party, supported by pertinent and corroborating information, UN Doc FCCC/KP/CMP/2005/8/Add. 3, 96, vi, para. 1 (a), (b).

76 Ibid., v, paras 4 (a)–(c), for an example see the above discussed case of Croatia. See also C. Voigt, ‘The Compliance and Implementation Mechanism of the Paris Agreement’ (2016) 25 *reciel* 161.

77 See L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *iclj* 493, at 505.

78 Art. 18 Kyoto Protocol reads: ‘The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol’.

envisaged facilitative nature of the new compliance procedure. However, even an non-adversarial and non-punitive procedure does not necessarily exclude the option of entailing legally binding measures. To include legally binding measures, it would need to be argued that they fall within the powers of the cma to adopt modalities and procedures and not require amending the Agreement.

The second question concerning the transfer of Kyoto mechanisms arises from the continuity of the market mechanisms. Even though the contribution of ghg emission reduction units acquired by States through participation in the carbon market was limited to a certain amount to ensure that they would only complement national efforts,⁷⁹ difficulties in accounting procedures remain. To ensure that the assigned amounts of each Party can be allocated at all times, especially when a Party starts trading under the different market mechanisms, national registries and an international mechanism to verify and allocate emission reduction units are required.⁸⁰ This international mechanism has been established under the Kyoto Protocol's trading scheme with the international transaction log (itl) and additional, supplementary transaction logs.⁸¹ The itl performs checks in order to approve the submitted data, thereby ensuring that transactions of emissions reductions units are transparent, conform to the rules of the Kyoto Protocol and to the data exchange standards.⁸²

79 While Art. 17 Kyoto Protocol states that the emission trading shall be supplemental to domestic actions, it does not provide for a certain limit of trading as compared to domestic measures, *supra* note 75. To ensure that a Party does not oversell units, each Party is required to maintain a reserve of erus, cers, aaus and/or rmus in its national registry, which must account for 90% of the Party's assigned amount or 100 percent of five times its most recently reviewed inventory, whichever is lowest, available at { [HYPERLINK "http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php"](http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php) \h } { [HYPERLINK "http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php"](http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php) \h } (last visited 29 September 2017).

80 The following registry systems can be identified: '(a) national registries, to be established and maintained by the Parties; (b) the clean development mechanism registry, to be established and maintained by the secretariat, under the authority of the Executive Board of the cdm, to manage accounts for non-annex i Parties, and entities authorized by them; (c) the international transaction log, to be established and maintained by the secretariat to monitor and verify the validity of transaction proposed by national registries and the cdm registry; (d) supplementary transaction logs which may be established and maintained by Annex i Parties to monitor and verify the validity of transactions proposed by their national registries. One example is the European Union Community Independent Transaction Log'. UN Doc FCCC/SBSTA/2005/INF.3, para. 6.

81 Supplementary checks are performed through the European Union Community Independent Transaction Log and other supplementary transaction logs. FCCC/SBSTA/2005/INF.3, 5. For a discussion see also A.S. Tabau, and S. Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union' (2010) 21 *ejil* 749, 753.

82 These standards have been defined based on decision 24/CP.8, UN Doc FCCC/CP/2002/7/Add.3.

All of the market mechanisms are operated for the purpose of meeting the targets of net emission changes for Parties involved. The Paris Agreement does not directly translate these market mechanisms into its agenda. It spells out the expectation that the contribution to mitigation with internationally acquired mitigation outcomes will lead to higher ambition and promote sustainable development, Art. 6(1), (4). Decisions on the further concretization of the mechanisms are within the competence of the cma, Art. 6(4), (7). The Paris Decision contains a reference to experience gained with and lessons learned from existing mechanisms under the Convention and its related legal instruments.⁸³ This justifies the expectation that the Kyoto mechanisms will influence the development of the carbon market beyond the second commitment period, albeit without clearly indicating the extent this could gain, leaving a considerable amount of discretion to future decisions of the cma when adopting rules and modalities.

As a novelty, Art. 6(9) introduces a ‘framework for non-market approaches to sustainable development’. These ‘integrated, holistic and balanced non-market approaches’ comprise, in the context of sustainable development and poverty eradication, efforts on mitigation, adaptation, finance, technology transfer and capacity-building, Art. 6(8). The framework aims at promoting mitigation and adaptation ambition and the participation of public and private sectors in the implementation of nationally determined contributions. The Paris Decision assigns the mandate to the Subsidiary Body for Scientific and Technological Advice to undertake a work programme under the framework for non-market approaches to sustainable development. The work programme must be considered and adopted by the cma.⁸⁴

iii Law-making cma Decisions

So far, this article has considered the Paris Agreement and the Paris Decision, both adopted by the cop, with a focus on provisions that enable the cma to adopt strategic decisions, in exercising its oversight function and in steering Party’s conduct. The following part elaborates why the different composition of Parties’ conferences or meetings under the unfccc matters from a legal point of view (1). This is followed by a discussion of criteria set forth in international law generally to identify law-making decisions (2). The term ‘law-making’ is crucial for this part and deserves some attention to clarify the underlying

⁸³ Paris Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 37 (f).

⁸⁴ Paris Decision, *ibid.*, paras 39, 40.

assumption. Law-making in this context refers to the creation of a legal rule that articulates a norm in ‘ought quality’.⁸⁵ Thus, for a certain activity or situation, a legal rule expressly articulates what must be done as a matter of law, not because of habit or convention.⁸⁶ Indicative of the will to create law in Parties’ decisions is the use of mandatory language, ‘shall’. By contrast, only a strong recommendation is made when using the word ‘should’. In addition, the specific reference to ‘each Party’ instead of the more general reference to ‘Parties’ is indicative of the ‘ought quality’ of the norm. It is also worth to note that the question of whether a rule can be enforced, does not determine its status as being legally binding.⁸⁷

1 *The Distinct Roles of the cop, cmp and cma*

Art. 7 unfccc establishes the cop as the supreme body of the Convention. Defining the subject matter competence of the cop, the provision states that the cop ‘shall keep under regular review the implementation of the Convention and any related legal instruments’, Art. 7 (2) unfccc. Thus, the mandate of the cop to review Parties’ progress and implementation extends to further legal instruments that can be (or have been) adopted by the cop. These include the Kyoto Protocol, the Paris Agreement and the Paris Decision.⁸⁸ The cop has extended the mandate to the newly created cma, to adopt further decisions based on the Paris Agreement and the Paris Decision. Whether the Parties’ conference is acting as cop, cmp or cma, the same rules of procedure apply, unless otherwise decided by consensus.⁸⁹ This could imply that the differentiation between the cop, cmp and the cma is merely an exercise in terminology. However, it does very much matter, in legal terms, whether a decision is taken by the cop under the unfccc, or by the cmp under the Kyoto Protocol, or the cma under the Paris Agreement, with direct legal consequences for Parties affected by the relevant decision. This will be illustrated in the following by reference to a decision of the Compliance Committee under the Kyoto Protocol.

⁸⁵ N. MacCormick, N., *Institutions of Law* (oup 2007) at 42.

⁸⁶ This could also result from an ‘internal aspect’ of conduct, H.L.A. Hart, *The Concept of Law* (2nd edned oup 1994), at 56, 88.

⁸⁷ See N. MacCormick, *Institutions of Law* (oup 2007) at 26, 61.

⁸⁸ Kyoto Protocol, *supra* note 75, Art. 13 (1); Paris Agreement, *supra* note 11, Art. 16 (1); it also manifests itself in the decision adopted by the cma at its first meeting in November 2016, as the cma invites the cop to continue to oversee the implementation of the work programme under the Paris Agreement in accordance with decision 1/CP.21, para. 5.

⁸⁹ Art. 13 (5) Paris Agreement, *supra* note 11; Art. 16 (5) Kyoto Protocol, *supra* note 75. See Decision 2/CMA.1 Rules of procedure of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, UN Doc FCCC/PA/CMA/2016/3/Add.1.

In this case, the Compliance Committee refused to take a decision of the cop under the unfccc into account, when considering Croatia's compliance with its targets under the Kyoto Protocol. The Compliance Committee under the Kyoto Protocol acts in many ways like a tribunal. Its decisions, which have received little attention in scholarly literature, have immediate consequences for the Parties concerned, as the following example illustrates. A case was referred to the Compliance Committee after the expert review raised concerns about Croatia's compliance with emission levels. Croatia had claimed that because of its particularly difficult circumstances as a country with an economy in transition, it should be entitled to increase its level of emissions for the base year 1990, through adding 3.5 Mt CO₂ equivalent. The cop decided pursuant to Art. 4 (6) unfccc that Croatia was indeed a country with an economy in transition and should thus be allowed to add this additional amount of emissions to its base year emission levels. This resulted in a higher level of emission allowances and made compliance with the reduction target easier to accomplish.⁹⁰

However, the Compliance Committee decided that Croatia exceeded its allowance of emissions and was in non-compliance with its assigned amounts of emissions and the commitment period reserve under the Kyoto Protocol, and did so without considering the decision of the cop. It did not accept the argument that the decision of the cop under the unfccc could support Croatia's claim. By contrast, the enforcement branch of the Compliance Committee held that in the absence of a decision of the cmp *under the Kyoto Protocol* on Croatia's specific circumstances, the decision of the cop *under the Convention* could not be used by Croatia to add to its assigned amount of emission levels for the achievement of its targets under the Kyoto Protocol.⁹¹

It stated: 'Since the Conference of Parties and the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol are two distinct decision-making bodies, the fact that all Parties to the Kyoto Protocol are also Parties to the United Nations Framework Convention on Climate Change does not provide sufficient basis for establishing the application of cop decisions under the Kyoto Protocol'.⁹²

90 Decision 7/CP.12 'Level of Emissions for the Base Year of Croatia' UN Doc FCCC/CP/2006/5/Add.1 para. 2: 'Decides that Croatia, having invoked Art. 4, paragraph 6, of the Convention, shall be allowed to add 3.5 Mt CO₂ equivalent of its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol for establishing the level of emissions for emissions for the base year for implementation of its commitments under Art. 4, paragraph 2, of the Convention'.

91 UN, CC-2009-1-6/Croatia/EB (13 October 2009) para. 21 (a).

92 UN, CC-2009-1-8/Croatia/EB (26 November 2009) para. 3 (c).

This led to the declaration of non-compliance of Croatia with its Kyoto commitments and suspended Croatia's eligibility to participate in the market mechanisms under Arts 6, 12 and 17 of the Kyoto Protocol. Such an exclusion of a Party means that any participation in the carbon market is suspended, until compliance is re-instated. Croatia initially lodged an appeal against this decision to the cmp but withdrew this at a later stage.⁹³ After submitting a revised plan for the reinstatement of compliance related to the calculation of the assigned amounts and the commitment period reserve, the enforcement branch decided that there no longer continued to be a question of implementation, and Croatia was again eligible to participate in the market mechanisms.⁹⁴

The interesting point of this in the present context is that the Compliance Committee of the Kyoto Protocol emphasized that the 'Conference of Parties' acts as a 'distinct decision-making body' under the respective legal instruments. The Committee based this argument explicitly on Art. 31 of the Vienna Convention on the Law of Treaties,⁹⁵ and also on customary international law.⁹⁶ The Kyoto Protocol allows flexibility only for the use of a different base year than 1990, Art. 3 (5) and not, as argued by the Croatian government, for changes to the historical level of anthropogenic emissions of ghg through adding emission allowance to the base year. The Convention and the Kyoto Protocol thus allow different degrees of flexibility available to Parties with economies in transition.⁹⁷ This demonstrates that decisions of the cop and the cmp, even if they would result in the same outcome, are not interchangeable and that they have distinct legal consequences. With the newly created cma under the Paris Agreement, a third separate body within the climate regime is added. The legal

93 See UN, CC-2009-1-14/Croatia/EB (8 February 2012) para. 2, UN, CC-2009-1-8/Croatia/EB, 26 November 2009.

94 *Ibid.*, *supra* note 91, CC-2009-1-14, para. 12.

95 Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 *unt*s 331 ('Vienna Convention'), the importance of the Vienna Convention on the Law of Treaties for the interpretation of any international treaty corresponds with the jurisdiction of the International Court of Justice, the ultimate authority on any matters dealt with in its text, see H. Thirlway, 'The International Court of Justice: Cruising ahead at 70' (2016) 29 *Ijil* 1103, at 1110.

96 UN, CC-2009-1-8/Croatia/EB, 26 November 2009, para. 3 (a): 'pursuant to Art. 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose'. It could be argued that the enforcement branch needed not to mention customary international law in addition to Art. 31 *vclt* as the provision is recognized as reflecting customary international law, see *icj*, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] *icj* Rep 6, at para. 41.

97 *Ibid.*, para. 3 (d).

impact of the cma will be of even greater importance considering the role the cma will be playing in shaping the mechanisms of the Paris Agreement and particularly in the oversight of the Paris Agreement.

2 *cma Decisions in International Law*

Law-making in the framework of multilateral environmental treaties, as traditionally conceived, is firmly anchored in the consent of all Parties to a treaty and its amendments.⁹⁸ The Paris Agreement confronts this concept with a new reality, where law-making occurs through decision-making that potentially replaces the need for treaty amendments or further protocols. While these decisions are still supported by Parties' consent, they are not part of the international treaty. However, that does not mean that they cannot be legally binding. The following section focuses on developing criteria to identify legally binding cma decisions.

The institution 'meeting or conference of Parties' is a stand-alone concept in international law. Organizationally, it can be described as a hybrid between a diplomatic conference and a permanent plenary body of an international organization.⁹⁹ More importantly is its function: States use conferences or meetings of Parties as a forum of review and action for implementing and developing multilateral law-making treaties.¹⁰⁰ Their decisions can develop an international treaty regime faster than any formal amendment procedure would allow. However, the legal implications of the decisions and their impact on Parties' obligations under the treaty regime are not always clear cut. Not all decisions taken in the framework of a conference or meeting of Parties are legally binding; they can also be recommendations for Parties or simply indicate a political intention. These issues have attracted much debate in scholarly literature. It has been argued that these decisions produce 'soft law',¹⁰¹ that they

98 J. Brunnée, 'COPing with Consent: Law-making under Multilateral Environmental Agreements' (2002) 15 *Ijil* 1.

99 J. Brunnée, *ibid.*, 16. The Whaling Commission is an example of a body of an international organization with relatively far-reaching competences, see Art. iii, v, of International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 *unts* 72.

100 V. Röben, 'Conference (Meeting) of States Parties', in R. Wolfrum, (ed.), *Max Planck Encyclopedia of Public International Law* (oup 2008–), available at { [HYPERLINK "http://www.mpepil.com/"](http://www.mpepil.com/) \h }, (last visited 10 October 2017).

101 The category of 'soft law' has been criticized frequently, see for instance L. Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 *iclj* 605, at 609; J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 *Ijil* 313, at 314; V. Röben, 'Institutional Developments under Modern International Environmental Agreements' (2000) 4 *MaxPlanckunyb* 363, 371; P. Weil, 'Towards Relative Normativity

have an operational impact,¹⁰² or manifest subsequent agreement between Parties regarding the interpretation of the treaty in the sense of the Vienna Convention of the Law of the Treaties.¹⁰³ There are also instances where the conference or meeting of Parties may adopt legally binding decisions because of a specific empowerment by the Parties.¹⁰⁴ However, the crucial question is whether decisions without such explicit authorization in an international agreement can also be legally binding. The illustration given above for the Kyoto Protocol demonstrates that they can determine the outcome of hard-law questions such as compliance or non-compliance of a State. Broader claims have also been made that Parties' conferences or meetings take on the role of international legislatures more generally,¹⁰⁵ leading to 'legislative law-making' next to 'contractual law-making'.¹⁰⁶ Yet this may risk over-looking significant differences between international legal regimes.

in International Law?' (1983) 77 *ajil* 413, 422. However, 'soft law' might well guide the interpretation of law. The International Court of Justice emphasized the need to take new standards and norms into consideration, with a view of to 'reconcile economic development with protection of the environment' as 'aptly expressed in the concept of sustainable development' *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] *icj Rep* 7, at 77–78, para. 140.

102 D. French, and L. Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere' (2013) 25 *jeil* 437, at 444.

103 Art. 31 (3) (a) of the Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 *unts* 331. Even recommendations which are not legally binding, can be a means for interpretation if they were adopted unanimously, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* [2014], *icj Rep* 226, at 248, para. 46: 'These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule'.

104 Under the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 *unts* 3, adjustments to the ozone depleting potentials of controlled substances can be enacted by a majority two thirds majority, and the decisions are then binding without the requirement of further consent of States and without offering an opt out procedure, Art. 2 (9) c and d.

105 J. Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in R. Wolfrum, and V. Röben, (eds), *Developments of International Law in Treaty Making* (Springer 2005), 101, 109; T. Meyer, 'From Contract to Legislation: The Logic of Modern International Law making' (2014) 14 *ChiJIntL* 559, 563; A. Steinbach, 'The Trend towards Non-consensualism in Public International Law: a (Behavioural) Law and Economics Perspective' (2016) 27 *ejil* 463, at 658.

106 T. Meyer, *ibid.*, 571. While it is correct that a protocol to the unfccc to replace the Kyoto Protocol 'cannot be ratified by states until it is first adopted by the Conference of the Parties to the unfccc', it is also worth to mention that the text of any proposed protocol shall be communicated to the Parties before such a session where it can be adopted, *supra* note 2, Art. 17 (2) unfccc.

Indeed, a ‘one size fits all approach’ is rather difficult to devise. The International Law Commission (ilc)¹⁰⁷ has offered a different approach to differentiate between legally binding decisions of a ‘Conference of Parties’ in international law, and those decisions that remain politically important but do not gain legal value. The ilc adopted in 2016 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.¹⁰⁸ Pursuant to these draft conclusions, the legal effect of such decisions depends on the particular case¹⁰⁹ and has to be determined in the light of the treaty, the rules of procedure and the circumstances of the concrete decision.¹¹⁰ The ‘specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties’ decision as a whole’ must be considered, and ‘its object and purpose, and the way in which it is applied, need to be taken into account’.¹¹¹ Legally binding decisions have to be clearly distinguished from a mere provision of practical options for implementation.¹¹² A further relevant consideration is ‘whether States Parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties’ decision’.¹¹³ The provision of a respective competence in the treaty is not a necessary condition for the decision to create a legal effect: ‘In any case, it cannot simply be said that because the treaty does not accord the Conference of States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments’.¹¹⁴

107 Established by the General Assembly, in 1947, under Art. 13 (1) (a) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 unts 16.

108 UNilc ‘Report of the International Law Commission on the Work of its Sixty-Eighth Session’ (2 May–10 June and 4 July–12 August 2016) gaor 71st Session Supp 10, Chapter vi: Subsequent agreements and subsequent practice in relation to the interpretation of treaties. For the fourth report of the Special Rapporteur Georg Nolte see GA, A/CN.4/694.

109 Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission, gaor 71st Session Supp 10, Part Four, Specific aspects Conclusion 11 [10] Decisions adopted within the framework of a Conference of States Parties, Commentary, at 201.

110 ‘The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under Art. 31, paragraph 3 (a), or give rise to subsequent practice under Art. 31, paragraph 3 (b), or to subsequent practice under Art. 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty’ . *ibid.*, para. 2.

111 *Ibid.*, para. 23.

112 *Ibid.*, para. 24.

113 *Ibid.*, para. 27.

114 *Ibid.*, para. 26, see also *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (Judgment) [2014] icj Rep 226, 248, para. 46.

With the *ilc* guidance in mind, the question of how the *cma* will direct the future development and implementation of the Paris Agreement and, for instance, whether the *cma* could adjust the temperature goal through a legally binding decision, can be answered as follows. Whether such a decision would be legally binding, would depend on the wording and the intention of the *cma*. An adjustment of the temperature goal within the given range of Art. 2(1)(a) Paris Agreement could be framed in a legally binding decision and consequently create tighter obligations for Parties. Such a strategic decision would not need to comply with the procedural requirements of an amendment to the Agreement, as it would have been the case pre-Paris. This is not to say that such a decision will be taken, but merely that the legal possibility exists under the Agreement; as outlined in Part ii, this is but one example among many other competences that the Agreement enshrines for law-making through *cma* decisions. Thus, the same rules apply to any other future decisions of the *cma*, based on the competences that the Agreement and the Paris Decision accord.

This potential for legal impact is not only relevant, internally, for the evolving international regime on climate change itself, but there are external consequences where the international regime touches another legal order, be it that of a State Party or of an international organization, such as the European Union (EU). A full analysis of the significance of the Agreement for the European legal order would go beyond the scope of this article. The following discussion focuses on the question how the governance of the European Energy Union is prepared for interaction with continuous decision-making of Parties.

IV External Impact of *cma* Decisions: The Governance of the European Energy Union

1 *Competence of the European Union for Climate Action*

It is the EU's self-perception to be at the heart of the High Ambition Coalition, a group of developed and developing country Parties pressing for ambitious Climate action.¹¹⁵ This flows from the principle of high level environmental protection as one of the general objectives and upwards moving targets of the EU, Art. 3 (3) Treaty on European Union (teu).¹¹⁶ The Paris Agreement was adopted by the EU on the basis of the general provision on the Environment,

¹¹⁵ For the historic development of the High Ambition Coalition see { [HYPERLINK "http://europa.eu/rapid/press-release_SPEECH-15-6320_en.htm"](http://europa.eu/rapid/press-release_SPEECH-15-6320_en.htm) \h } { [HYPERLINK "http://europa.eu/rapid/press-release_SPEECH-15-6320_en.htm"](http://europa.eu/rapid/press-release_SPEECH-15-6320_en.htm) \h } (last visited 29 September 2017).

¹¹⁶ E. Morgera, 'Environmental Law' in C. Barnard and S. Peers (eds), *European Union Law* (oup 2017) 666. teu, OJ EU 2016 C 202/13.

Art. 191 Treaty on the Function of the European Union (tfeu) in conjunction with Art. 218 (6) (a) tfEU.¹¹⁷ For the implementation of internationally agreed climate action, the EU takes recourse to the newly acquired energy competence.¹¹⁸ With the Treaty of Lisbon, which came into force in 2009, the European Union gained the competence for legislation in the field of energy, Art. 194 tfEU.¹¹⁹ This provision aims at ensuring the functioning of the energy market, security of energy supply, promoting energy efficiency and energy saving and the development of new and renewable forms of energy, Art. 194 (1) tfEU. Energy is a shared competence between the EU and the Member States, Art. 4 (2) (i) tfEU.¹²⁰ When exercising its energy competence, Union measures shall not affect the right of the Member States to ‘determine the conditions for exploiting its energy resource, its choice between different energy sources and the general structure of its energy supply’, Art. 194 (2) tfEU. Together with the environment competence of the EU in Arts 191, 192 tfEU, the energy competence permits a climate-driven multi-level regulation of a decarbonized energy economy, which becomes the transmission belt for the Paris Agreement, the Paris Decision and CMA decision-making thereunder.

2 *Aligning the Governance of the Energy Union with the Paris Agreement, the Paris Decision and Future CMA Decisions*

In November 2016, the EU Commission submitted its proposal for a regulation (hereinafter ‘draft regulation’) of the European Parliament and of the Council on the governance of the European Energy Union, consistent with ambitious climate action under the Paris Agreement.¹²¹ The draft regulation aims at bringing together ‘existing scattered planning and reporting obligations from the main pieces of EU legislation across energy, climate and other Energy Union related policy areas’.¹²² It is designed to ensure that the EU’s 2030 energy and climate targets are attained. The Council introduced in May 2018 the proposal to amend the title of the draft regulation to regulation on ‘Governance of

¹¹⁷ Council Decision (EU) 2016/1841 of 5 October 2016, OJ L 282 (19.10.2016), 1–3.

¹¹⁸ Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, of 30 November 2016, COM (2016) 759 final, at 4.

¹¹⁹ tfEU, OJ EU 2016 C 202/47.

¹²⁰ For a discussion of the concept of shared competences see R. Schütze, *European Union Law* (cup 2015) 238.

¹²¹ Proposal for a Regulation of the European Parliament and of the Council on the governance of the Energy Union, of 30 November 2016, COM (2016) 759 final. The proposal is currently being considered by the Council and the European Parliament in the ordinary legislative procedure, for the position of the Council see the Interinstitutional File 2016/0375 (COD) of 8 May 2018.

¹²² COM (2016) 759 final, at 2.

the Energy Union and Climate Action'.¹²³ The European Parliament proposed to introduce into the Preamble of the regulation reference to the Paris Agreement, that would explicitly align the 2030 and long-term objectives of the Energy Union with the 2015 Paris Agreement.¹²⁴ While there are many elements still to be discussed between the Council, the Commission and the European Parliament concerning the draft regulation,¹²⁵ agreement exists in so far as the draft regulation aims at integrating the objectives and mechanisms of the Paris Agreement into the EU governance structure.¹²⁶

Especially the provision on aggregate assessment of national plans and target achievement links the efforts of Member States under the draft regulation directly with their commitments under the Paris Agreement. The European Council invites in its conclusions following the meeting in March 2018 the Commission to present 'by the first quarter of 2019 a proposal for a Strategy for long-term EU greenhouse gas emissions reduction in accordance with the Paris Agreement, taking into account the national plans'.¹²⁷ These 'national plans' are the integrated national energy and climate plans that the draft regulation requires from Member States.¹²⁸ The Council's position is to encourage Member States to provide their first integrated national energy and climate plans as early as possible in order to allow proper preparations, in particular

123 Council of the European Union, Annex to the Interinstitutional File 2016/0375 (cod) of 8 May 2018, at 8.

124 *Ibid.*, at 10.

125 For instance, the nature of the four key targets that were agreed on 24 October 2014 on the 2030 Framework for Energy and Climate for the Union is subject to debate: The Commission's proposal and the Parliament's position is that there were four targets agreed: at least 40% cut in economy wide greenhouse gas emissions, at least 27% improvement in energy efficiency with a view to a level of 30%, at least 27% for the share of renewable energy consumed in the Union, and at least 15% for electricity interconnection. The Council's position is that 27% improvement in energy efficiency were agreed as an indicative target, to be reviewed by 2020, Annex to the Interinstitutional File 2016/0375 (cod) of 8 May 2018, at 13. See also the conclusion of the European Council on 24 October 2014, *euco* 169/14, at 5.

126 'The proposed Regulation contributes to the implementation of the Paris Agreement including its five-years review cycle and ensures that monitoring, reporting and verification requirements under the *unfccc* and Paris Agreement are harmoniously integrated in the governance of the Energy Union', *ibid.*, at 3. The European Parliament's position is to make this alignment even more explicit, see Annex to the interinstitutional file 2016/0375 (cod) of 8 May 2018, at 14.

127 European Council, *euco* 1/18, 23 March 2018, at 4. For guidance on national plans *com*(2015) 572 final, 18 November 2015.

128 Art. 3 (1) of the draft regulation reads requires that 'by 1 January 2019 and every ten years thereafter, each Member State shall notify to the Commission an integrated national energy and climate plan'. *com*(2016) 759 final, at 25.

for the participation in the facilitative dialogue under the Paris Agreement.¹²⁹ Starting from October 2021, the Commission will annually assess the progress of Member States towards achieving: ‘commitments under Art. 4 of the unfccc and Art. 3 of the Paris Agreement as set out in decisions adopted by the Conference of the Parties to the unfccc, or by the Conference of the Parties to the unfccc serving as the meeting of the Parties to the Paris Agreement’, Art. 25(4)(a) draft regulation.

This particular provision opens the European Union legal order for dynamic obligations, explicitly as they arise from strategic cma decision-making under the referenced provisions. It is surprising that the Commission in its proposal refers to Art. 3 Paris Agreement, a provision which does not contain an obligation for each Party, but nevertheless creates a strong normative expectation of progression overall.¹³⁰ Art. 3 sets out a cross-cutting provision that envisages progression and improvement, yet only Art. 4(2) Paris Agreement provides an obligation of each Party to prepare and communicate nationally determined contributions. To place Art. 3 Paris Agreement and not Art. 4(2) Paris Agreement on the same level as Art. 4 unfccc may indicate a different reading by the Commission: that both provisions are the legal basis for future commitments. This would place an additional value on the cross-cutting provision of Art. 3 Paris Agreement and the expectation of progression that it entails. It is also worthwhile mentioning in this context that Art. 3 Paris Agreement does not enable the cma explicitly to adopt decisions, while Art. 4 paragraph 2 (d) unfccc does, in obliging the cop to review the adequacy of the commitments of Annex i Parties. The Commission’s reading of Art. 3 Paris Agreement in conjunction with Art. 4 unfccc turns the former into an enabling clause that it is not when read on its face.

The draft regulation aims at harmonizing the existing Climate Monitoring Mechanism with the provisions of the Paris Agreement and to enable the EU to participate in the review process under the new transparency framework.¹³¹ To ensure compliance with the increased transparency requirements of the Paris Agreement, EU Member States will be obliged to submit biennial progress reports ‘on the implementation of the plans from 2021 onwards across

129 *Ibid.*, at 26.

130 ‘[A]ll Parties are to undertake’ ... and ‘The efforts of all Parties will represent a progression over time ...’, see also L. Rajamani, ‘Guiding Principles and General Obligation (Article 2.2 and Article 3)’, in D. Klein et al. (eds), *The Paris Agreement on Climate Change. Commentary and Analysis* (oup 2017), Part ii, Chapter 8.

131 Proposal for a Regulation of the European Parliament and of the Council on the governance of the Energy Union, of 30 November 2016, com (2016) 759 final, at 5. See also the impact assessment of the Proposal for a Regulation of the European Parliament and the Council on the governance of the Energy Union, swd(2016) 394 final, at 17.

the five dimensions of the Energy Union to track progress'.¹³² This comprises a biennial report on national climate change adaptation planning and strategies, 'in line with the timeline given in the Paris Agreement'. However, it should be mentioned that this timeline is not set out in the Paris Agreement, but in the Paris Decision.¹³³

The draft regulation establishes national system requirements, to account for nationally determined contributions. This includes the legal basis for the establishment of Union and national registries to allow for the use of internationally transferred mitigation outcomes under Arts 4 (13) and 6 of the Paris Agreement. Member States are obliged to establish by 1 January 2021, and to continuously improve thereafter, their national inventory systems to estimate anthropogenic emissions by sources and removals by sinks of greenhouse gases. The draft regulation goes beyond the Paris Agreement at present, in so far as it also contains a list of certain greenhouse gases that are to be included in those national inventory systems.¹³⁴ This also holds true for the assessment of progress at Union level in relation to the objectives of the Energy Union, the progress made by each Member State towards meeting its own targets, the effects of air traffic on overall emissions and pertinent data, Art. 25 draft regulation.

The draft regulation includes the proposal to confer on the Commission the competence in accordance with Art. 290 tfeu 'to amend the general framework for integrated national energy and climate plans (template), set up a financing platform to which Member States can contribute in case the Union trajectory towards the 2030 Union renewable energy target is not collectively met, take account of changes in the global warming potentials and internationally agreed inventory guidelines, and set substantive requirements for the Union inventory system...'. In exercising its competence, the Commission 'should also consider, where necessary, decisions adopted under the unfccc and the Paris Agreement'. This conferral of competence on the Commission to 'adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act', Art. 90 (1) tfeu, does not come without constraints. The European Parliament or the Council may decide to revoke the delegated power. However, the mandate of the Commission is closely

¹³² These five dimensions are: energy security solidarity and trust; internal energy market; moderation of demand; decarbonization including renewable energy; and research, innovation and competitiveness.

¹³³ Paris Decision, 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, para. 60.

¹³⁴ Proposal for a Regulation of the European Parliament and of the Council on the governance of the Energy Union, of 30 November 2016, com (2016)759 final, Chapter 6, Art. 30 (1), ghg listed in Part 2 of Annex iii to the draft regulation.

linked with future strategic decisions under the Paris Agreement and the Paris Decision.

The draft regulation is based on previous decisions adopted by the European Council, the Energy Council and the European Parliament, a strong positive indicator for adoption.¹³⁵ It shapes the aim of the Energy Union in relation to international legislation. The draft regulation indicates that future EU legislation will be aligned not only with the Paris Agreement, but also with relevant cop and cma decisions. Consequently, these decisions will influence the legislative process in the EU. Concerning the use of Art. 3 Paris Agreement as the legal foundation for future commitments, it remains to be seen whether EU legislation in turn might also contribute to the interpretation of certain provisions of the Agreement as enabling clauses.

V Executive Law-making, Legal Certainty and Legitimacy

The new approach to law-making, where obligations of Parties are to be concretized and even created outside the international treaty through decisions, inevitably affects the significance of the international treaty as the manner and form of international law-making. The Paris Agreement sets forth a new *modus operandi* of law-making. It couples a treaty with strategic infra-treaty decision-making that entails legal consequences, but provides less legal certainty and affects the legitimacy of the international treaty as traditionally perceived.

1 Legal Certainty

The Paris Agreement and the Paris Decision set out competences for future action of the cma. The Paris Agreement provides a distinct narrative as the foundation for the exercise of these competences, however, the Paris Decision provides in many instances a greater number of regulatory details, with legal relevance, than mere interpretations of the Agreement would do. In addition, the analysis above has pointed out that the cma will have to flesh out many provisions. These decisions of the cma will build the operative layer of the Agreement. This layer will determine the success of the global effort to reduce the risks of climate change.

The cma will have to clarify what a sufficiently ambitious ndc will look like, to define terms such as ‘flexibility’, to ensure the provision of sufficient financial support, and to develop mechanisms such as the global stocktake or

¹³⁵ See also the discussion in the Council, Council of the European Union, 20 September 2017, 7204/1/17 REV 1, leaving the here discussed provisions unchanged.

the wim. This renders future formal treaty-making and even amendment procedures superfluous.

This approach risks diminishing the significance of the Paris Agreement. Parties adopted a framework convention that would be widely acceptable, with considerable leeway for cma decisions to steer further climate action. This may well guarantee speedier regime development, in line with scientific knowledge. But it lacks any formalized guarantee that this will happen: progress depends largely on Parties' decisions. By contrast, an obligation enshrined in an international treaty is more difficult to change, and therefore, provides a higher level of legal certainty. States have no discretion but to implement such obligations, otherwise they risk to breach the treaty.¹³⁶

Leaving the decision on the creation of future legally binding obligations to strategic decision-making, risks first of all, that the relevant decision will never be adopted. No new obligation will arise in that scenario. In the reality of multilateral treaty negotiations a Party will align its own interests with that of other Parties to achieve certain outcomes on a wider range of issues. By contrast, a Party is more likely to block a single decision outside the context of such complex treaty negotiations, where the Party might not lose as much substantial bargaining power as a result.¹³⁷ Furthermore, if a new decision is adopted but a Party decides not to comply with it, the consequences that this has under international law are not as clear. While these decisions can represent legally binding obligations, as discussed above, the consequences of a breach of such a decision of a Parties' meeting is not clearly established in international law. Perhaps rules for this event need to be developed as law-making gravitates into strategic decisions at infra-treaty level. Arguably, one could explore the use of a broad interpretation of Art. 12 of the Draft Articles on State Responsibility, regarding the 'origin or character' of an international obligation, as the pivotal point for defining a Party's non-compliance with such a decision as a breach of

¹³⁶ Art. 12 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in UN ilc 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001) gaor 56th Session Supp 10; see also J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (cup 2002).

¹³⁷ Falkner points out that even if unilateral climate clubs were established as part of the unfccc framework, their bargaining power would not necessarily be sufficient to pressurize large emitters, see R. Falkner, 'A unilateral solution for global climate change? On bargaining efficiency, club benefits, and international legitimacy' (2016) 14 *Perspectives on Politics* 1, 87, at 97.

an international obligation.¹³⁸ The relevant question here is to decide whether or not law-making through strategic decisions by a Parties' meeting is captured by the ilc's definition of law-creating processes that are recognized by international law. Despite the fact that Art. 12 of the Draft Articles on State Responsibility sets out a wide approach in defining the sources of an international obligation, the ilc commentary stresses that the 'formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law'.¹³⁹ The decisive question is thus, whether or not strategic decision-making is a process that is recognized as a law-creating process under international law. At present, the question of legal consequences resulting from non-compliance with cma decisions that are legally binding remains unaccounted for.

2 Which Question of Legitimacy?

The approach to international law-making that the Agreement enshrines also raises questions relating to legitimacy. This section aims to identify the starting point for a broader discussion. This discussion will not question the validity of the goal of climate change treaty-making, but rather the procedural changes of international law-making that the Paris Agreement and the Paris Decision represent.

Discussion of legitimacy in a legal context is not free from controversy and depends on underlying assumptions which originate in different schools of thought.¹⁴⁰ The difficulties in finding common ground increase considerably

138 Art. 12 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'. in UN ilc 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001) gaor 56th Session Supp 10. Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, unriaa, vol. xx (Sales No. E/F.93.V.3) 215 (1990); M. Pugh, 'Legal Aspects of the Rainbow Warrior Affair' (1987) 36 iclq 616.

139 *Ibid.*, at 55.

140 A. v. Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. v. Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010), 3, at 8, 20; S. Kadelbach, From International Public Law to Public International Law: A Comment on the 'Public Authority of International Institutions and the 'Publicness' of their Law, in A. v. Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010), at 33; R. Wolfrum, 'Legitimacy in International Law from a

when viewing legitimacy at the international level from the domestic perspective, thereby presuming an organizational framework that simply does not exist on the international plane. For this section, legitimacy is understood as an abstract legal concept that justifies public authority, because it makes procedure and outcome of authoritative decisions predictable.¹⁴¹ This involves two main factors, firstly, a pre-agreed procedure for producing rules is applied and secondly, the outcome does not deviate from already accepted rules and standards, unless the procedure allows for such fundamental changes. Procedure and outcome are thus inter-dependent and one cannot replace the other in the attempt to legitimize authority.

The very question of legitimacy which the Paris Agreement raises does not fit into the ever-evolving debate on the persistent challenges of global governance, with questions of accountability of international organizations and their legitimacy in international law¹⁴² and of different actors in multi-level regulatory systems.¹⁴³ The international regime to combat climate change is not an international organization and neither the cop nor the cma represents an independent body thereunder. The validity of consent of any State acting as a Party on the international level is not at stake either: that continued consent is present and expressed in the decision-making by the Parties through

Legal Perspective: Some Introductory Considerations', in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Springer 2008), 1, at 6.

¹⁴¹ Please check the unpaired quotation mark in the sentence "Public International Law: A Comment on..."

141 D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Röben, (eds), *Legitimacy in International Law* (Springer 2008), 1, 309, at 310; with emphasis on the element of predictability, A. Buchanan and R.O. Keohane, 'The Legitimacy of Global Governance', in R. Wolfrum and V. Röben, (eds), 25; *Legitimacy in International Law* (Springer 2008), T.M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *ajil* 88, at 91; N. MacCormick, *Institutions of Law* (oup 2007) at 154, J.H.H. Weiler employs the metaphor of geology to capture the changing normative concept of legitimacy in international law, J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547, at 548.

142 J.C. Morse and R.O. Keohane, 'Contested Multilateralism', in A. Dreher *et al.* (eds), *The Review of International Organizations* (Springer 2014), available at {
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"https://www.princeton.edu/%7Erkeohane/publications/PublishedCM.pdf" \h } (last accessed 11 October 2017); N. Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27 *ejil* 329, at 333.

143 See N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (oup 2010), at 16, for the special challenge posed through the contribution of private actors in transnational environmental regulation see V. Heyvaert, 'The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation' (2016) 4 *Ise Law, Society and Economy Working Papers*, at 9.

the cop or the cma. In accordance with the draft rules of procedure, the cma continues to reach decisions by State consent on all matters of substance.¹⁴⁴

Yet still, the proliferation of law-making by strategic decisions questions the legitimacy of the law that results from it, because it moves international action away from domestic parliamentary control.

For many States, future law-making under the Agreement disconnects international legislation from legislative approval and national political processes involving democratically elected institutions. Regardless how international law is received at the national level, i.e. whether a monist stance or a dualist approach is adopted, only the Paris Agreement and not the Paris Decision will be the point of reference as the relevant international law.¹⁴⁵ Whether the Paris Agreement will then be either directly applicable after ratification or trigger the need for national legislation, is a distinctly separate question. Even under the theory of strict dualism, as applied for instance in the United Kingdom, where national and international law remain separate until the international agreement is transposed into national law, only the Agreement will be considered as the relevant international law to serve as basis for an Act of Parliament. Thus, independent of the theoretical approach to the reception of international law from the domestic perspective, many States employ democratically elected institutions to make core decisions nationally and internationally. The legitimacy of an international treaty tends to depend on the legislative endorsement in one way or the other.¹⁴⁶ The Paris Agreement confounds this balance of powers with a new approach to law-making outside established treaty avenues. As a result, legislative approval of an international treaty becomes less significant. At the same time, it may be rather difficult to argue that legislative approval of the treaty comprehensively authorizes these future decisions through a meeting of Parties.

One could argue that for States that endow their national governments with international treaty making power under certain conditions, for instance through executive agreements, law-making through decisions affects the Parliament's role less, at least at a first glance. For instance, under US constitutional law, an international treaty requires a two-thirds majority of the Senate if it contains certain legally binding obligations, Art. 2, § 2 cl. 2 US Constitution. In relation to the Paris Agreement, new financial commitments or binding emission

¹⁴⁴ Art. 16(5) Paris Agreement: Draft Rules of Procedure, Rule 42, UN Doc FCCC/CP/1996/2.

¹⁴⁵ For the different theories see J. Crawford, *Brownlie's Principles of Public International Law* (8th ednoup 2012) at 48, 88.

¹⁴⁶ M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *ejil* 907, at 924.

targets would have triggered the need for parliamentary approval in the US.¹⁴⁷ Inclusion of such provisions in a decision outside the Agreement thus avoids involving the Senate. This bypasses domestic intervention that could risk the feasibility of the Agreement. On the downside, this approach reduces the resilience of the Agreement against political changes. As a result, abandoning the Paris Agreement became a matter to be solely decided by US President Donald Trump. Even if legislative approval is not needed to bring the international agreement into existence as an executive agreement, constitutional arrangements are nevertheless challenged if substantive issues are included in decisions, that would have triggered the need for parliamentary debate had they been part of the international agreement.

This outcome-oriented approach to develop the Agreement through decision-making by Parties certainly permits, but does not guarantee, speedier regime development than treaty amendments involving ratification.¹⁴⁸ Effectiveness or output legitimacy alone, even if it is coupled with a 'good cause', is not sufficient to justify authoritative decision-making outside the pre-agreed procedure.¹⁴⁹

Regardless of whether parliamentary approval is required, law-making through strategic decisions under the Paris Agreement affects the constitutional arrangements of all Parties and this is the question of legitimacy that merits further exploration.

VI Conclusions

The Paris Agreement breaks new legal ground in various ways and this article has explored in detail its specific approach to law-making that is designed to

¹⁴⁷ In accordance with the Byrd-Hagel Resolution 1997, S.Res.98 – A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, agreed with 95 votes in favour and no vote against it, S. Rept. 105–54, available at { [HYPERLINK "https://www.congress.gov/bill/105th-congress/senate-resolution/98"](https://www.congress.gov/bill/105th-congress/senate-resolution/98) } { [HYPERLINK "https://www.congress.gov/bill/105th-congress/senate-resolution/98"](https://www.congress.gov/bill/105th-congress/senate-resolution/98) } (last visited 7 June 2018), see also D. Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 *ajil* 288, 297.

¹⁴⁸ J. Brunnée, 'International Environmental law and Community Interests: Procedural Aspects' in E. Benvenisti and G. Nolte (eds), *Community Interests Across International Law* (oup 2018), available online { [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784701"](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784701) } { [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784701"](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784701) } (last visited 7 June 2018) at 26.

¹⁴⁹ See R. Falkner, 'A Minilateral Solution for Global Climate Change? On Bargaining Effi-

ciency, Club Benefits, and International Legitimacy' (2016) 14 Perspectives on Politics 1, 87, with a discussion of output and input legitimacy, at 94.

pave the way for future action at the international level to combat climate change. Four conclusions resonate from the analysis. First, the Paris Agreement and the Paris Decision together set forth the regulatory substance of a new framework-cum-decisions model that bases mitigation of climate change on ndcs by its Parties in combination with a strong normative expectation of progression and elements of oversight to steer collective and individual efforts. Second, Parties intend to use the cma not only to review progress and implementation of the Paris Agreement, but to actively drive Parties' ambition and to make skeletal provisions operational through continuous decision-making. The cma defines the content and form of these decisions, which could be legally binding in international law. Third, this means of creating obligations requires the governance of the Energy Union to adapt to continuous strategic decisions. Fourth, relying on continuous strategic decisions has implications for legal certainty and legitimacy of international climate action.

First. In relation to the regulatory substance agreed in Paris, the Agreement for the first time sets a temperature target as a global long-term climate goal, and obliges all Parties to aim for the best nationally determined contributions available to them. A significant omission is that this is done without defining the elements of an ndc. The Agreement strongly relies upon self-perception by its Parties, a normative expectation of progression, and peer pressure through enhanced transparency and a public register. The global stocktake contains elements of a top-down oversight mechanism. The cma has a new oversight function to shape this procedure, and the competence to define sources of input from Parties, to take stock of their collective efforts, and to inform their successive ndcs. The cma could drive ambition further through establishing a temperature goal close to 1.5°C. Oversight is complemented by expert review, with a view of coherent reporting and accounting obligations in accordance with cma guidelines for all Parties. Flexibility may be granted, depending on the decision of the cma. Besides mitigation, the Agreement recognizes adaptation as a global goal. Parties also accept that compensation is necessary, where mitigation and adaptation efforts prove to be insufficient. The cma carries the function of steering Parties towards achieving these goals. The cma will have to define how adaptation efforts of developing country Parties are recognized, how financial flows will be made predictable and efficiently used, and whether the wim may include liability provisions at some point in the future. Likewise, decisions on concrete financial support and on compliance and the design of the carbon market will be adopted by the cma.

Second. The Agreement was achieved because it provides the setting for a new method to develop a treaty regime, which represents more than just a gradual shift. A new framework convention-cum-decisions model emerges

from a compromise: the Agreement demonstrates the will of its Parties to reduce the risks of climate change, but also the lack of commitment to accept obligations in the Agreement itself. As a result, the cma is endowed with autonomy to govern the Agreement, and the success of the Agreement will depend on its decision-making, not on an additional protocol or treaty amendments. cma decisions will need to clarify and establish obligations of conduct and determine the details of procedural requirements Parties have to fulfil.

Third. This aspect concerns the external impact of cma decision-making. The proposal for the governance of the European Energy Union demonstrates that cma decisions will have significant implications for the European Union, where it becomes necessary to continuously align its regulations with the means and objectives of climate action at the international level. The governance of the European Energy Union underpins European climate action with the objectives of the agreement and provides explicitly for the reception of future decisions of the cma. As such, European Union legislation will function as transmission belt for internationally agreed regulation. cma decisions could drive the process of decarbonizing the European economy. If the competences of the cma is used efficiently, the Paris Agreement could well become an effective instrument to govern decarbonization in the 21st century.

Fourth. The significant increase in cma decision-making powers results from thinning the fabric of the new tablecloth, the Paris Agreement itself. While the Paris Agreement relies upon cma decisions to be fully operational, the Agreement itself cannot guarantee that these decisions will be adopted, and if, when that will be. This alone results in a decrease of legal certainty on climate regulation at the international level. Furthermore, leaving substantial issues for further decision-making prevents emerging obligations from entrenchment in treaty law. This in turn increases uncertainties in relation to the consequences of non-compliance with such decisions. The question of legitimacy that this article has identified as one that merits further exploration concerns the competence gain of the cma and as such, will be more visible in a situation where the cma is actually acting. In such a scenario, decision-making by the cma does effectively take place and makes the Paris Agreement operational, in accordance with the competences assigned to the cma by the Paris Agreement and the Paris Decision as outlined throughout this article. Considering that these decision could be legally binding, law-making gravitates towards decisions adopted by national governments through the actions of their representatives in the cma. This contravenes constitutional arrangements of Parties. Law produced outside international agreements diminishes the participatory role of national parliaments, a role normally tied to formal treaty-making. While parliaments may control the ratification or approval of

the Paris Agreement, the accompanying Paris Decision and all further decisions fall entirely within the prerogative of national governments. In cases where these decisions gain an equal legal impact as those in the Agreement itself, parliamentary participation might need re-thinking to balance democratic participation and ultimately, to make the Paris Agreement the long-term success that it needs to be.

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